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Supreme Court, U.S.
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No. 98-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

BRIEF OF *AMICI CURIAE* CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA FORESTRY ASSOCIATION, CALIFORNIA MINING ASSOCIATION, AND HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF LANDGATE, INC.'S PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The California Chamber of Commerce is a non-profit association with more than 10,000 members, both individual and corporate, representing virtually the entire spectrum of economic activity in California; the California Building Industry Association is a non-profit association with more than 5,000 members engaged in land development and commercial, industrial, and residential construction throughout California; the California Cattlemen's Association is a non-profit corporation representing California's beef cattle industry; the California Forestry Association is an association of California's forest product companies; the California Mining Association is an association representing over 50 companies involved in mining exploration, permitting, and production in California; the Home Builders Association of Northern California is a non-profit association representing over 950 members active in the home building industry in northern California.

Amici curiae represent a broad range of real property owners and a significant portion of California's regulated community. *Amici's* members are subject to land-use regulation by California's state and local governmental agencies on a daily basis and have historically sought to ensure that such regulation comports with the strictures of the United States Constitution's Just Compensation Clause. *Amici* and their members have long been active participants in California's regulatory takings arena and are able to bring to bear a unique perspective on why the Petition should be granted.[1]

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[1] Written consent has been obtained from counsel for Petitioners and Respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office. Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that

(continued...)

REASON FOR GRANTING THE PETITION

A STATE SUPREME COURT MAY NOT DISREGARD THIS COURT'S INTERPRETATION OF THE FEDERAL JUST COMPENSATION CLAUSE IN ORDER TO SHIELD STATE AND LOCAL GOVERNMENTS FROM PAYING COMPENSATION FOR A TEMPORARY TAKING.

For years the California Supreme Court and this Court have waged an ongoing battle over a fundamental question of regulatory takings law: where there is a judicial determination that a land-use regulation has denied all economically viable use of property and thereupon the governmental agency elects to rescind the regulation, is the property owner entitled to damages in inverse condemnation for the temporary taking of its property? The importance of the question cannot be overstated. As Justice Holmes recognized long ago, its resolution is determinative of whether the state's regulatory power will extend "more and more until at last private property disappears."

In a series of cases culminating with *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds*, *Agins v. Tiburon*, 447 U.S. 255 (1980), the California Supreme Court declared that the exclusive remedy for a land-use regulation that denies all economically viable use of property is invalidation—unless, after a judicial decree that the regulation goes "too far," the

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(...continued)
no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

governmental agency elects to continue the regulation and proceed to condemn the property in eminent domain. In short, the court took the position that there can never be damages in inverse condemnation for a temporary regulatory taking where the governmental agency rescinds the offending regulation. In the court's view, protection of the public treasury and expansion of the police power were sufficiently compelling public policy reasons to reject the availability of damages for a temporary taking.

While this Court could reasonably expect that its decisions to the contrary in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) settled the matter, the decision below indicates that the California Supreme Court has not accepted defeat. Relying *sub silencio* on *Agins v. Tiburon*, 24 Cal.3d 266 (1979) and its precursors, the California Supreme Court held below that the California Coastal Commission's denial of Petitioner Landgate's development permit did not effect a temporary regulatory taking requiring payment of compensation, notwithstanding that (1) the decision was ripe for review and (2) Landgate was denied all economically viable use of its property from the time of the denial until a court invalidated it.[2]

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[2] Petitioner correctly notes that in the Coastal Commission's Petition for Review to the California Supreme Court, the Commission did not seek review of the California court of appeal's determination that the Commission's permit denial deprived Landgate of all economically viable use of its property, and that under California Rules of Court, Rule 28, the issue was not before the California Supreme Court. *See* Pet. at 6 n.5; *see also Kavanau v. City of Santa Monica*, 16 Cal.4th 761, 779 (1997). The same is true of the court of appeal's determination that the Commission had made a final decision on Landgate's application.

This is an instance where what is past is prolog.[3] It is but the latest manifestation of the California Supreme Court's historical unyielding determination to shield California's state and local governmental agencies from *ever* having to pay damages to a property owner for a temporary regulatory taking. As the Petition ably demonstrates, the court's conclusion is fundamentally inconsistent with this Court's regulatory takings jurisprudence as well as decisions of other state and federal courts. *Amici* will not repeat these arguments. Rather, *amici* will place the decision below in its historical context, tracing its underpinnings back to the California Supreme Court's earlier regulatory takings cases.

Revisiting these cases reveals a remarkable similarity between them and the present case. In reasoning and result they are virtually indistinguishable. Indeed, it is not unfair to characterize the decision below as a purposeful attempt by the California Supreme Court to resuscitate these earlier opinions.[4] Thus, in addition to the persuasive reasons set forth in the Petition, this Court should grant review for an equally compelling one: to reaffirm that under the Supremacy Clause, a state supreme court is not free to disregard this Court's interpretation of the *federal* Just Compensation Clause based on the state court's determination that such an interpretation improperly threatens state and local treasuries. *Cf.*

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[3] Justice Brown, dissenting below, put it this way: "The more things change, the more they remain the same." Pet. App. 41a.

[4] It is no coincidence that the crucial initial decisions, like the decision below, were authored by Justice Stanley Mosk.

Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745, 1747, 1749 (1995).[5]

A. A Constitutional Marker.

This Court set forth a constitutional marker on the question of the availability of damages in inverse condemnation in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In that seminal decision, the Court strongly suggested that a regulation which eliminates all beneficial use of property goes "too far" to be sustained as a proper exercise of the police power, triggering an obligation under the Just Compensation Clause to pay compensation. *Id.* at 415. Some 40 years later, the Court reaffirmed this principle in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), confirming that "the form of regulation [can] be so onerous as to constitute a taking which constitutionally requires compensation." *Id.* at 594. While it may be that these decisions did not definitively answer the question, their import was sufficiently clear that Justice Brennan could opine that any decision precluding the availability of damages for a temporary taking would "flatly contradict[]" them. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting).

B. Quiet On the West Coast Front.

Until the 1970's, the California Supreme Court gave no indication that it would resist the marker set forth in *Mahon* and *Goldblatt*. Indeed, in cases like *House v. LA. County Flood*

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[5] Below, even the dissenting Justices advanced the view that the California Supreme Court possesses discretion to reject United States Supreme Court precedent on a "point of constitutional law that is applicable to the very issue before us," so long as it provides a "reasoned basis" for doing so. Pet. App. 41a (Brown, J., dissenting).

Control Dist., 25 Cal.2d 384 (1944), the court acknowledged that "When [the police power] passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise *requires compensation.*" *Id.* at 388 (emphasis added); *see HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal.3d 508, 524 (1975) (Clark, J., dissenting). In 1973, however, the court decided the first of three cases portending that a battle with this Court would be joined over the issue of damages for a temporary taking.

C. Three Shots Across the Bow.

Between 1973 and 1975, the California Supreme Court decided three cases that together sent a clear signal that it would not abide by this Court's previous suggestion that a landowner is entitled to damages under the Just Compensation Clause where a regulation that substantially advances a legitimate state interest nonetheless denies all economically viable use of property. These cases are significant because they are the direct lineal antecedents of the present case.

The first, *Selby Realty Company v. City of San Buenaventura*, 10 Cal.3d 110 (1973), concerned a city's denial of a building permit to construct a 54-unit apartment complex on land already zoned multifamily. The landowner's complaint sought, *inter alia*, a writ of mandamus to compel issuance of a building permit and damages in inverse condemnation. The trial court granted the city's demurrer. *Id.* at 115-116.

The California Supreme Court, in an opinion by Justice Mosk, reversed the trial court as to the mandamus cause of action, but affirmed as to the inverse condemnation cause of action. The court held that although the landowner stated a

cause of action in mandamus to compel the issuance of a building permit on the ground that the city abused its discretion in denying the permit, there was "no[t] a cause of action in inverse condemnation stated for the denial of the building permit. The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. *The appropriate method by which to consider such a claim is by a proceeding in mandamus*...." *Id.* at 128 (emphasis added). *Selby* is significant because it represents the genesis of the position advanced by the California Supreme Court in the instant case: that even where a plaintiff alleges that its property has been taken by regulation, mandamus rather than damages is the appropriate remedy.[6]

The second case was *State of California v. Superior Court of Orange County*, 12 Cal.3d 237 (1974).[7] In *Veta*, the landowner applied to the California Coastal Commission for a permit to develop property located in the coastal zone. The Commission denied the permit, and the landowner filed a petition in the superior court for a writ of mandamus and other relief, including damages in inverse condemnation in the amount of $8,815,250. *Id.* at 243, 252. The trial court overruled the Commission's demurrer and the Commission sought immediate review by prerogative writ. Overcoming its usual "great reluctance...to employ the prerogative writ to review rulings on

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[6] *Selby* would later gain notoriety in Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n.10. In that dissent, Justice Brennan demonstrated how the regulatory excesses engendered by *Selby* vindicated Justice Holmes' admonition that, freed from any realistic possibility of financial liability for overzealous regulation, the "natural tendency" of state and local governments would be to extend the police power "more and more until at last private property disappears."

[7] The Veta Company was the real-party-in-interest.

the pleadings," the California Supreme Court granted extraordinary review because it "felt compelled to intervene in the early stages of the present case because of the prospect that the Commission's functions could be seriously hampered...if it were required to defend unmeritorious lawsuits *seeking damages* based on denials of permits. *Id.* at 243 n. 3 (emphasis added).

The California Supreme Court, again in an opinion by Justice Mosk, reversed the trial court and ordered it to grant the Commission's demurrer. It is significant that, for purposes of ruling on the demurrer, the court accepted as true the landowner's allegation that its "application for a permit was denied in order that its land would 'remain undeveloped and devoted to, and held for, public use as open space land.'" *Id.* 252-253. Nonetheless, the court rejected the landowner's argument that the permit denial "constitutes a taking or damaging of its land, *either permanently or temporarily*, without just compensation." *Id.* at 252 (emphasis added).

For purposes of the instant case, *Veta*'s importance stems from the court's clear suggestion that the *purpose* of a land-use regulatory measure is a *dispositive* factor in determining whether it effects a regulatory taking requiring compensation. Although Justice Mosk's opinion did allow that it was necessary to examine "the effect of the Commission's action upon Veta's property," *id.* at 235, the court gave *no consequence* to what that examination revealed—an alleged denial of all use or value. *See ibid*: "The situation involved in the present case is *virtually indistinguishable* from *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.*, 11 Cal.App.3d 557, 570-572 (1970). In that case the plaintiff alleged a taking of its property based upon the denial by the Bay Conservation and

Development Commission of a permit to fill a parcel of land in San Francisco Bay. *It was alleged that the land had no value except as fill.*" (emphases added).

Despite apparently accepting as true for purposes of the demurrer the allegation that the Commission's permit denial deprived Veta's land of all use and value, the court nonetheless concluded that Veta had not stated a cause of action for damages in inverse condemnation because of the *overriding public purposes* advanced by the Commission's permit denial. *Id.* at 253. Those overriding public purposes were the protection of the California coastline and the prevention of "haphazard" development. *Ibid*—the very public purposes identified by Justice Mosk in the opinion below as being so substantial as to immunize the Commission from damages even though its permit denial deprived Landgate of all economically viable use of its property for over two years. *See* Pet. App. 22a-25a.

The third case was *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal.3d 508 (1975). Although only the "narrow issue" of whether a land-use regulation that causes a diminution in value of property—as opposed to a total deprivation of use—effects a regulatory taking was before the court, it nonetheless addressed the additional argument raised by "numerous *amici*" that the Just Compensation Clause mandates payment of damages where a regulation is found to have effected a taking. *Id.* at 511. The court answered the question in the negative. It opined that "neither the state and federal constitutions nor public policy compel or counsel" this result. *Ibid.*

In reaching its conclusion, the court relied on *Selby* for the proposition that "we have recognized mandamus as the proper remedy for allegedly arbitrary or discriminatory zoning, *id.* at

513, and *Selby* and *Veta* for the proposition that the impact of a land-use regulation on the value of the property cannot "constitute a taking impermissible in the absence of compensation." *Id.* at 514. According to the court, such a land-regulation "rises to a taking only in connection with inequitable precondemnation actions by the public agency." *Id.* at 516.

The court was unimpressed by the argument that invalidation of an overly restrictive regulation would not properly compensate a landowner that had in fact been deprived of all economically viable use during the period preceding judicial invalidation:

> Plaintiffs also...argue that even if they ultimately succeed in their efforts to obtain a court decision invalidating the challenged zoning ordinance, they will still suffer an uncompensated loss of use of the property in question during the period between enactment of the challenged ordinance and its demise.... [T]hey argue that invalidation of the offending zoning ordinance will not suffice to compensate them for the damage they suffered by reason of its existence.... The fallacy in the argument inheres in its failure to recognize that inverse condemnation lies only for a taking or damaging, while improper zoning may generally only be attacked by mandate....

Id. at 519-520.

Writing in dissent, Justice Clark took strong exception to the majority's conclusion. In his view, once a landowner establishes that a regulation has deprived property of substantially all beneficial use, the Just Compensation Clause

mandates compensation—at least for a temporary taking: "Once the landowner establishes his cause of action for damages, the condemning agency has several alternatives including...rescinding the downzoning, in which case the agency would be abandoning a condemnation, becoming liable to the landowner for interim damage, costs and attorney's fees." *Id.* at 527 (Clark, J. dissenting).

D. An Insurrection.

The court's decision in *HFH, Ltd.* ostensibly left "for another day...the question of entitlement to compensation in the event a zoning regulation forbade substantially all use of the land in question." *HFH, Ltd. v. Superior Court of Los Angeles County, supra*, at 518 n.16. The California court of appeal took the court's opinion at face value in *Eldridge v. City of Palo Alto*, 57 Cal.App.3d 613 (1976), *disapproved in Agins v. Tiburon*, 24 Cal.3d 266. In *Eldridge*, the landowners alleged that due to a municipal zoning ordinance "they were and are denied any substantial or reasonable use of their property," *id.* at 624. This confronted the court of appeal with the following questions: "May a zoning ordinance operate so oppressively upon affected property owners as to require payment of compensation in an action for inverse condemnation? Or, in such a case, is the landowner's sole remedy an action to invalidate the ordinance...?" *Id.* at 618.

Specifically noting the direction set forth in *Mahon* and reaffirmed in *Goldblatt*, and finding no "express holding of this state's Supreme Court," *id.* at 618, the court of appeal determined that "In light of the...authority on the subject we are unable to say, as a matter of law, that plaintiffs' complaints have not stated a cause of action for damages in inverse condemnation against the City." *Id.* at 629. Furthermore, contrary to the expressed view of the California Supreme Court,

the court of appeal concluded that there is "no merit" in the contention that because a regulatory action advances legitimate governmental purposes it is "in some way immune from the application of the rule of *Penna. Coal Co. v. Mahon*...." *Ibid.* Thus, the court of appeal recognized that a regulation that substantially advances legitimate state interests may nonetheless be challenged in proceedings for damages in inverse condemnation: "We opine...that a *valid* zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." *Id.* at 621 (emphasis added).

Justice Sims dissented. In his view, *HFH, Ltd.*, *Veta*, and *Selby* foreclosed the possibility of a temporary taking even for a regulation that denied all economically viable use of property: "It is clear...that the confiscatory nature of the regulation is not grounds for a cause of action for damages, but the measure of the constitutional power to regulate.... [N]o compensation is in order unless the public body elects to proceed to condemn the [plaintiff's] interest[]. *Id.* at 640-641 (Sims, J., dissenting).[8]

E. Frontal Attack.

In *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds, Agins v. Tiburon*, 447 U.S. 255 (1980), the California Supreme Court "reach[ed] the issue" it had nominally left open in *HFH, Ltd. Agins v. Tiburon*, 24 Cal.3d 266, at 274. The court left no doubt that it would not follow *Mahon* and *Goldblatt* and that state and local agencies in California would

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[8] Justice Sims also found "The lone voice of Justice Brandeis," which argued against the regulatory takings concept in *Mahon*, to be "more attuned to modern concepts" of land-use planning. *Id.* at 640 n.5. This has clearly been the view held by a majority of the California Supreme Court at least since *Selby* and continuing to the present.

for all practical purposes never be liable for damages in inverse condemnation:

> [A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or administrative mandamus to invalidate the ordinance as excessive regulation.... He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.

Id. at 273. In so holding, the court expressly disapproved *Eldridge v. City of Palo Alto, supra. Ibid.*

The court sought to portray its holding as consistent with *Mahon* and *Goldblatt*. It described those cases as having been "cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases...." *Id.* at 274. This assertion, however, is not persuasive. It appears that the court simply disagreed with *Mahon* and *Goldblatt* and decided on public policy grounds to disregard them:

> We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged.... [T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary.... [T]he use of inverse condemnation with its imposition of money

> damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power.

Id. at 276, 278.

The preceding passage from *Agins* is the key to every regulatory takings decision of the California Supreme Court from *Selby* through the present case. The doctrinal pronouncements common to each case—(1) that the public purposes advanced by a land-use regulation can be so important as to prevent it from effecting a taking even if it denies all economically viable use of property; and (2) that the exclusive remedy for a regulation that denies all economically viable use of property is invalidation unless the governmental agency elects to enforce the regulation permanently—were adopted and have been maintained to further the court's express goal that no California state or local agency be inhibited from exercising its police power to regulate the *use* of private property in whatever manner it deems necessary to effectuate sound land-use and environmental planning.[9]

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[9] Justice Clark saw this quite clearly:

> Today's real issue is the extent to which a court will permit—even encourage—governmental agency intrusion into a constitutionally protected area.... Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency...elects, without compensation.

Id. at 283 (Clark, J., dissenting).

F. Aborted Counterattacks.

Almost immediately, this Court made clear that the California Supreme Court had erred grossly in *Agins* and its precursors. While for various reasons the Court was unable to repudiate *Agins* in a direct holding, see *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (ripeness); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (ripeness); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (ripeness); and *Agins v. Tiburon*, 447 U.S. 255 (1980) (decided on other grounds), in *San Diego Gas & Electric Co.* a majority of the Court expressed agreement with Justice Brennan's forceful opinion that the Just Compensation Clause mandates compensation for a temporary taking:

> California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a 'taking' within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court.

Id. at 647 (Brennan, J., dissenting).

Recognizing that any interpretation of the Just Compensation Clause must square with its underlying purpose of ensuring fundamental fairness for property owners, Justice Brennan declared that "Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken." *Id.* at 655 (Brennan, J., dissenting) To the California Supreme Court's invocation of the need to protect the public fisc as justification for precluding such damages, Justice Brennan responded that "the applicability of express constitutional

guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so." *Id.* at 661 (Brennan, J., dissented).[10]

G. Squelching Insurrection.

The California Supreme Court was unfazed by Justice Brennan's dissent or the fact that it represented the majority view of this Court. The same year that this Court decided *San Diego Gas & Electric Co.*, the California court of appeal issued a published opinion finding that a complaint alleging a denial of all economically use states a cause of action for damages in inverse condemnation, the court declaring that on the question of damages for a temporary taking, "California's position flatly contradicts clear precedent of United States Supreme Court cases." Two months later, the California Supreme Court ordered the opinion depublished.[11]

H. Two Missiles Launched. [12]

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court unambiguously and completely repudiated the principles

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[10] Justice Brennan also took issue with the assertion that invalidation rather than damages would necessarily promote sounder land-use policy. *Id.* at 661 n.26 (Brennan, J., dissenting).

[11] Prior to being depublished, *Gilliland v. City of Palmdale* was reported at 127 Cal.App.3d 386; 179 Cal.Rptr. 627 (1981).

[12] In *Lucas*, Justice Blackmun described the Court's opinion as a missile launched to kill a mouse. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (Blackmun, J., dissenting)

which the California Supreme Court has consistently invoked to protect California's state and local governmental agencies from regulatory takings liability. *Lucas* held that a regulation which denies all economically viable use of property effects a categorical taking requiring compensation unless the governmental agency could have proscribed the proposed uses under background principles of state property law. *Id.* at 1027, 1031-1032. *Lucas* also held that such a regulation effects a taking requiring compensation even where the regulation—in *Lucas* a state coastal agency's permit denial—substantially advances important goals. *Id.* at 1020-1026. As the earlier discussion makes clear, *Lucas*' teaching on these points runs contrary to the California Supreme Court's insistence—continued in the present case—that a land-use regulation will not constitute a taking requiring compensation so long as it advances important environmental and planning interests even if it denies all economically viable use of property.

First English likewise rejected the second principle on which the California Supreme Court has historically invoked: that a land-use regulation can never give rise to damages for a temporary taking. Essentially adopting Justice Brennan's dissent in *San Diego Gas & Electric Co.*, the Court held that where a land-use regulation denies all economically viable use of property and thereby effects a taking, the landowner is constitutionally entitled to damages in inverse condemnation for a temporary taking even if the regulation is ultimately rescinded. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra,* at 319.

In a direct nod to Justice Brennan's earlier opinion, and a direct reproach to the California Supreme Court, the Court took dead aim at the key concern animating the California Supreme Court's regulatory takings jurisprudence, *i.e.*, its determination to ensure that California's regulatory agencies are able to

engage in expansive land-use and environmental planning with *no threat* of financial liability under the Just Compensation Clause. The Court firmly declared that although these concerns are not trivial, they cannot override the dictates of the Just Compensation Clause of the Fifth Amendment:

> We realize that...our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause is one of them.

Id. at 321.[13]

The history set forth herein, as well as the persuasive arguments put forth in the Petition, leaves no doubt that the California Supreme Court will not of its own volition follow this Court's precedents on this issue of federal constitutional law. The Petition should be granted to force it do so.

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[13] Chief Justice Rehnquist would echo this theme in *Dolan v. Tigard*, 512 U.S. 374 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First or Fourth Amendment, should be relegated to the status of a poor relation").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Northern California

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